

SCOPE OF BARGAINING

BASIC NEGOTIABILITY TRAINING



1

DISTINCTION BETWEEN THE DUTY TO BARGAIN AND THE SCOPE OF THE DUTY TO BARGAIN

THE DUTY TO BARGAIN

- CONCERNS WHETHER THE PARTIES ARE OBLIGATED TO BARGAIN AT ALL.

CIRCUMSTANCES WHEN THE DUTY TO BARGAIN MAY ARISE:

- TERM (New contract).
- UNION-INITIATED (during the contract term or after expiration of the contract).
- MANAGEMENT-INITIATED (during the contract term or after the expiration of the contract; also known as a unilateral change).

2

DISTINCTION BETWEEN THE DUTY TO BARGAIN AND THE SCOPE OF THE DUTY TO BARGAIN

SCOPE

- Concerns WHAT the parties are obligated to bargain about.

Three important categories to remember:

- MANDATORY SUBJECTS (parties must bargain about these subjects).
- PERMISSIVE SUBJECTS (parties may, but are not required, to bargain about these subjects).
- PROHIBITED OR EXCLUDED SUBJECTS (parties may not bargain over these subjects).

3

NEGOTIABILITY ISSUES ARE ISSUES CONCERNING THE SCOPE OF THE DUTY TO BARGAIN

Sections of the Statute Primarily Involved

- A. § 7103(a)(14)--Definition of Conditions of Employment
- B. § 7117(a)(1)--Matters Inconsistent with Law and Government-wide Regulation
- C. § 7117(a)(2), (3)--Agency Regulations for which a Compelling Need Exists
- D. § 7106(a)--Management Rights

4

NEGOTIABILITY ISSUES ARE ISSUES CONCERNING THE SCOPE OF THE DUTY TO BARGAIN (CON'T)

Sections of the Statute Primarily Involved (Con't)

- E. § 7106(b)(1)--Matters Over which an Agency May Choose to Bargain
- F. § 7106(b)(2)--Procedures which Management will Observe when Exercising Rights under Section 7106
- G. § 7106(b)(3)--Appropriate Arrangements for Employees who are Adversely Affected by the Exercise of Management's Rights under Section 7106

5

BASIC SCOPE OF THE DUTY TO BARGAIN

- An agency **MUST BARGAIN** over the **CONDITIONS OF EMPLOYMENT** of **UNIT EMPLOYEES**
 - **CONDITIONS OF EMPLOYMENT** (§ 7103(a)(14)).

Matters directly related to the employment relationship. *Antilles*, 22 FLRA 235 (1986).
 - **EXCEPT**: Conditions of employment that concern:
 1. Political activities
 2. Classification of positions
 3. Matters specifically provided for by Federal statute

6

BASIC SCOPE OF THE DUTY TO BARGAIN

■ • UNIT EMPLOYEES

Matters must concern members of the bargaining unit.

Naval Aviation Depot, Cherry Point v. FLRA,
952 F.2d 1434, 1438 (D.C. Cir. 1994).

- Matters that concern parties outside the unit:
 - Members of other units (prohibited)
 - Supervisors/Management officials (permissive)
 - Nonemployees (bargainable if "vitally affect" unit employees)
 - Unrepresented employees (?)

(Note: If a proposal concerns the conditions of employment of unit employees, it will not be outside the duty to bargain if it indirectly affects persons in these four groups.)

7

BASIC SCOPE OF THE DUTY TO BARGAIN

EXCLUSIONS FROM THE BASIC SCOPE

- Matters that are specifically provided for by Federal statute are excluded from the definition of "conditions of employment" under § 7103(a)(14)(C).

Bureau of Engraving and Printing, 50 FLRA 677 (1995).

- Mere reference to a matter by a statute is not sufficient to exclude that matter from the basic scope of the duty to bargain.
- Matter **IS NOT** specifically provided for to the extent that the statute allows the agency **DISCRETION** as to that matter. (Discretion means § 7103(a)(14)(C) not a bar).
- Matter **IS** specifically provided for to the extent that the statute leaves the agency **NO DISCRETION** as to that matter. (No discretion means § 7103(a)(14)(C) a bar).

8

EXCEPTIONS TO THE BASIC SCOPE OF THE DUTY TO BARGAIN

LAW AND GOVERNMENT-WIDE REGULATIONS

- Matters that are inconsistent with law are prohibited from bargaining.
 - “Inconsistent” means “mutually repugnant or contradictory.” (Proposal is incompatible or irreconcilable with provisions of law).
Office of Personnel Management, 3 FLRA 784, 785 (1980).
 - “Law” means, essentially, Federal statutory provisions. For example, title 5 of the United States Code, which prescribes many of the conditions of employment of many Federal employees.

9

EXCEPTIONS TO THE BASIC SCOPE OF THE DUTY TO BARGAIN

LAW AND GOVERNMENT-WIDE REGULATIONS

- Matters that are inconsistent with Government-wide regulations are prohibited from bargaining.
 - “Regulations” includes official declarations of policy, issued by an agency having authority to do so, that are binding on Federal agencies and officials. For example, OPM regulations (5 C.F.R.), Federal Travel Regulations, OMB Circulars.
 - “Government-wide” means applicable to the Federal civilian workforce as a whole; i.e., generally applicable throughout the Federal government as opposed to specific, limited groups.
IRS, New Orleans District, 3 FLRA 748, 752-55 (1980).

10

EXCEPTIONS TO THE BASIC SCOPE OF THE DUTY TO BARGAIN

AGENCY REGULATIONS FOR WHICH A COMPELLING NEED EXISTS

- Duty to bargain extends to the regulations of an agency, or a primary national subdivision of an agency, (DoD/Dep't of the Air Force), unless a compelling need exists for the regulation.

In order to demonstrate that a regulation bars negotiation on a proposal, the agency must: (1) identify a specific regulation; (2) show that there is a conflict between that regulation and the proposal; and (3) demonstrate that there is a compelling need for the regulation under § 2424.50 of the Authority's Regulations.

11

EXCEPTIONS TO THE BASIC SCOPE OF THE DUTY TO BARGAIN

DISCRETION

- ● Discretion
 - To the extent that a statutory provision or regulation affords the agency discretion with respect to a particular subject matter, a proposal that is within that discretion is not inconsistent with the provision or regulation. *SEIU, Local 200-B*, 44 FLRA 821 (1992).
- Sole and exclusive discretion
 - To the extent a statute or regulation provides that **ONLY** agency can act with respect to a particular matter, the agency has "sole and exclusive discretion" as to that matter, and a proposal that requires the agency to use that discretion in a particular way is inconsistent with the statutory provision or regulation. *Office of Thrift Supervision*, 47 FLRA 884, 892-99 (1993)

12

EXCEPTIONS TO THE BASIC SCOPE OF THE DUTY TO BARGAIN

MANAGEMENT'S RIGHTS UNDER SECTION 7106(a)

- Matters that affect the exercise of the rights enumerated in § 7106(a) are prohibited from bargaining.

(At a minimum, the words of § 7106, i.e., “nothing in this chapter shall affect,” mean that the duty to bargain established by the Statute shall not affect those rights.)

Generally speaking, a proposal affects the exercise of a right if it:

- prohibits the exercise of the right
- requires the exercise of the right
- restricts the exercise of the right

13

EXCEPTIONS TO THE BASIC SCOPE OF THE DUTY TO BARGAIN

MANAGEMENT'S RIGHTS

- § 7106(a)(1): Management has the right to determine:
 - its mission
 - its budget
 - its organization
 - the number of its employees
 - its internal security practices.

14

EXCEPTIONS TO THE BASIC SCOPE OF THE DUTY TO BARGAIN

MANAGEMENT'S RIGHTS

- § 7106(a)(2): Management has the right, *in accordance with applicable law*, to:
 - (A) hire, assign, direct, layoff and retain employees, and to suspend, remove, reduce in grade or pay, or take other disciplinary action;
 - (B) assign work, contract out, determine personnel who will do the work of the agency;
 - (C) fill positions by making selections for appointment from among properly ranked candidates or from any other appropriate source;
 - (D) take whatever actions may be necessary to carry out the agency's mission during emergencies

15

EXCEPTIONS TO MANAGEMENT'S RIGHTS

MATTERS MANAGEMENT MAY ELECT TO BARGAIN, PROCEDURES, APPROPRIATE ARRANGEMENTS

- § 7106(b) establishes exceptions to the management rights set out in § 7106(a).

(The wording of § 7106, i.e., "Subject to subsection (b), nothing in this chapter . . .," indicates that the rights set forth in § 7106(a) are limited by the provisions of § 7106(b)).

- Management may, at its election, bargain over the numbers, types and grades of employees assigned and over methods, means and technology (§ 7106(b)(1)) (Permissive)
- Procedures (§7106(b)(2)) (Mandatory)
- Appropriate arrangements (§7106(b)(3)) (Mandatory)

16

FRAMEWORK FOR ANALYZING ISSUES UNDER §7106(a) and (b)

- ● Examine first whether the proposal affects a management right under § 7106(a)
- If it does, examine next whether the proposal constitutes a procedure under § 7106(b)(2) or an appropriate arrangement under § 7106(b)(3)
- If the proposal affects a management right, and is not a procedure or appropriate arrangement, examine whether the proposal concerns any of the matters about which an agency may elect to bargain under § 7106(b)(1)

HUD Council of Locals 222, Local 2910, 54 FLRA 171 (1998)

17

EXCEPTIONS TO MANAGEMENT'S RIGHTS

APPROPRIATE ARRANGEMENTS

■ Elements:

To be negotiable as an appropriate arrangement, a proposal must:

- be an "arrangement," i.e., mitigates or remedies
- address an adverse effect on employees, i.e., must be "tailored" to apply to those employees adversely affected
- address an adverse effect that results from the exercise of a management right
- be "appropriate," i.e., on balance, the benefit to employees that results from implementation of the proposal must outweigh the burden imposed by the proposal on the exercise of management's rights

Kansas Army National Guard, 21 FLRA 24, 29-35

18

- AND THAT'S ONLY THE BEGINNING . . .